

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

CCG HOLDINGS, INC.
Employer-Petitioner

and

Case No. 29-UC-524

MOTION PICTURE PROJECTIONISTS, LOCAL 640,
INTERNATIONAL ASSOCIATION OF
THEATRICAL STAGE EMPLOYEES
Union

DECISION AND ORDER

CCG Holdings, Inc. (the Employer-Petitioner), doing business as Clearview Cinemas, operates 54 movie theaters in four states, including New York. Projectionists employed at the Employer's nine theaters in Nassau and Suffolk counties, New York, have been represented by the Motion Picture Projectionists, Local 640, International Alliance of Theatrical Stage Employees (the Union), since at least 1995. The bargaining unit has included projectionists, as well as hybrid positions known as "theater manager/operators" and "assistant theater manager/operators" (hereinafter referred to collectively as "manager/operators"). The Employer filed a petition for clarification under Section 9(b) of the National Labor Relations Act, seeking to clarify the bargaining unit by excluding the manager/operators on the ground that they are supervisors as defined in Section 2(11) of the Act. The Union disagrees, contending that the manager/operators are non-supervisory employees, and contending moreover that the unit clarification procedure is not appropriate for upsetting the parties' established practices.

A hearing was held before Tabitha Tyle, a Hearing Officer of the National Labor Relations Board. In support of its contention that the manager/operators are supervisors, the Employer called two witnesses to testify: Doug Oines (vice president of operations) and Adam Sands (division manager for Manhattan and Nassau/Suffolk). The Union called Joseph Matus, manager/projectionist at the Babylon theater, to testify.

As discussed in more detail below, I conclude that the manager/operators are statutory supervisors, and I will therefore grant the Employer's petition for clarification and exclude them from the bargaining unit.

FACTS

Bargaining history and other background information

The parties' bargaining history is undisputed. According to the parties' stipulation (Bd. Ex. 2)¹, the Union has represented a bargaining unit of "moving picture machine operators" (also known as "operators" or "projectionists") employed by a predecessor employer, the Clearview Cinema Group, at all of its theaters in Nassau and Suffolk counties, New York. The Union and the predecessor employer entered into a collective bargaining agreement, effective from September 1, 1995, to August 31, 1999 (Jt. Ex. 1). The 1995-99 agreement allows for a hybrid classification called an "operator/manager" at certain theaters. The contract provides that the operator/manager "shall perform all the customary duties of a manager, in addition to the projectionist booth duties." The contract also provides for both a "regular" operator/manager and a "relief" operator/manager, which apparently corresponds to the manager/operator and assistant manager/operator classifications now in dispute.

¹ References to the record are abbreviated herein as follows: "Tr. #" refers to transcript page numbers, and "Bd. Ex. #," "Jt. Ex. #," "Er. Ex. #" and "Un. Ex. #" refer to Board, Joint, Employer and Union exhibit numbers, respectively.

After that agreement went into effect, the Clearview Cinema Group was acquired by Cablevision in December 1998. Cablevision, the parent company, continued to operate the Clearview movie theaters under a subsidiary name, CCG Holdings, Inc., the Employer herein. There is no dispute that CCG Holdings recognized the Union as the collective bargaining representative of its projectionists at that time, including the manager/operators, and continued to apply the terms and conditions of the 1995-99 contract to all of those classifications. After the contract expired in 1999, CCG Holdings continued to apply the terms and conditions of the contract, and the parties have been negotiating for a successor contract. However, as of the date of the hearing, no agreement had been reached for a successor contract.

The Employer currently operates a total of nine theaters of differing sizes in Nassau and Suffolk counties. The four largest theaters (known as Franklin Square, Port Washington, Soundview and Squire), with six or more movie screens each, have “dedicated” projectionists, i.e., projectionists whose only duties are to operate the multiple projection booths, and who do not perform any “managerial” duties. Those four theaters have their own, non-union theater managers and assistant theater managers, who do not perform any projectionist duties and who are not in issue in this case. However, the five smaller theaters (Babylon, Grand Avenue, Herricks, Manhasset and Roslyn), with only three to five movie screens each, have the hybrid manager/operators who are disputed herein. Specifically, the disputed individuals are as follows:

Babylon theater:	Joseph Matus, manager/operator
Grand Avenue theater:	Michael LoPiccolo, manager/operator
Herricks theater:	Edward Lindley, Sr., manager/operator and Michael Roller, assistant manager/operator

Manhasset theater: Jack Dumas, manager/operator and
Steven Diaz, assistant manager/operator

Roslyn theater: Stephen Truglio, manager/operator and
Yishai Amar, assistant manager/operator

(See Er. Ex. 1.) Some theaters, such as Babylon and Grand Avenue, also have non-union assistant managers, who do not perform any projectionist duties and who are not in issue in this case.

All theaters have “floor staff” employees, who tasks include selling tickets at the box office, selling popcorn and other items at the concession stand, taking tickets from customers as they enter the theater, and cleaning various areas of the theater. The floor staff at each theater ranges from six part-time employees (Roslyn theater, four screens) to 16 part-time employees (Grand Avenue, five screens). Many floor employees are teenaged students, who work on a seasonal basis (e.g., summers and holidays when they are home from college). Floor employees are not in the bargaining unit represented by the Union.

Thus, the specific issue in this case is whether the manager/operators at those five smaller theaters “supervise” the floor employees, as that term is defined in the Act.

Vice president of operations Doug Oines testified that Clearview used to have eight division managers for its theaters in four states (including New York, New Jersey, Connecticut and Pennsylvania) at the time Cablevision took over in 1998. However, subsequent reorganizations reduced the number of division managers to four in 2001, and then to three in 2003, making each division manager responsible for more theaters. Oines testified generally that these changes have shifted more responsibility to the local

theater managers.² Division manager Adam Sands, who is responsible for 16 theaters in Manhattan and Nassau/Suffolk, testified that he visits each theater in his division only two or three times per month.

The Employer filed the instant petition for clarification on June 1, 2004. As noted above, there is currently no collective bargaining agreement between the Union and CCG Holdings.

Specific duties of the manager/operators

The written job description (Er. Ex. 6) generally states that each manager/operator must “direct and supervise all theater employees,” as well as operating and maintaining the projection and sound equipment. The description also specifies that the manager/operator “hires, trains, directs and supervises all employees, including disciplining and terminating employees as directed by HR [human resources].”

Time spent on projectionist duties

The projectionists’ duties in the projection booth include preparing each film for projection, and operating and maintaining the projection and sound equipment. Oines testified generally that, once the films are running, the projectionist may leave them unattended and perform duties outside of the booth. Division manager Sands estimated that the manager/operators spend only 20% of their time in the projection booth, and 80% of their time performing administrative, supervisory and “floor” duties (such as taking tickets or helping at the concession stand). By contrast, manager/operator Matus

² In describing what decisions are made at the local theater level, as opposed to the division level or the corporate headquarters, the Employer’s witnesses spoke of “theater managers” collectively, to include non-union managers, non-union assistant managers, union manager/operators and union assistant manager/operators. Thus, the term “theater managers” herein may include those four sub-groups collectively. Nevertheless, where testimony specifically referred to the manager/operators in dispute, the classifications will be specified accordingly herein.

estimated that he spends 40% to 50% of his time in the booth, and only 50% to 60% of his time doing administrative “paperwork” and helping on the floor. In any event, there seems to be no dispute that the manager/operators spend no more than half their time performing traditional projectionist duties.

Scheduling employees

The Employer contends that the manager/operators are responsible for scheduling employees. There appears to be no dispute that the number of floor employees at each theater fluctuates somewhat, depending on the day of the week, the season, the popularity of particular movies and other factors. As an obvious example, Oines mentioned that a theater needs more employees on a Saturday than on a Monday. Both Sands and Matus testified that the Employer has established a minimum number of floor employees needed for each shift. However, Sands stated that local theater managers are responsible for actually staffing the theaters, and they may exceed the minimum number of floor employees without prior approval from upper management.

Manager/operators devise the weekly schedule, using the Employer’s computerized “time and attendance” program, and deciding how many employees to schedule for each shift. Both Oines and Sands testified that manager/operators also deal with employees’ requests for time off, without needing approval from upper management. Sands specifically testified that he does not deal with floor employees’ time-off requests at all, and Matus did not dispute this contention. Furthermore, the manager/operators are responsible for verifying and approving employees’ time records. Oines explained that, although employees do not punch a time card, there is a time-keeping function in the computer program; manager/operators must verify that the

employees' recorded times are accurate, by checking certain boxes in the computer program. The Employer's payroll department in New Jersey then uses the computerized time records to prepare the employees' paychecks.

Although Oines initially testified that manager/operators are "solely" responsible for scheduling employees, the Employer has nevertheless established certain parameters within which the manager/operators must operate, such as the minimum shift numbers mentioned above. In this regard, it was noted that each theater has a certain budget, and theater managers must try to stay within the budget. Furthermore, all requests to assign overtime work must be approved by Sands (Er. Ex. 26(a)). On occasion, when Sands finds that manager/operators are going over their budgets, he tells them to cut back. For example, in February 2004, Sands sent a memo to all theater managers complaining that "we are wasting a considerable amount of money in staff payroll," e.g., by scheduling more employees than necessary to open and close the theaters, and ordering the managers to start staggering floor employees' arrival and departure times (Un. Ex. 2). Sands' memo noted that "Managers will be held accountable for improper scheduling." On another occasion, when Sands directed Matus to cut the payroll for the Babylon theater, Matus decided to reduce everybody's hours across the board, rather than singling out any particular employees. Thus, although the Employer sets certain limits in terms of the payroll budget and overtime expenses, it appears that local theater manager/operators have leeway to schedule employees within those limits.

Hiring employees

Likewise, it appears that local theater manager/operators have discretion to decide how many floor employees to hire overall, albeit within their budgetary

constraints. Sands testified that manager/operators may ask him for “guidance” in this regard, but that they ultimately make the decision. For example, Edward Lindley, Sr., who started as a theater manager/operator in January 2004, asked Sands four months later how many floor employees he would need for the summer. Sands testified that, by contrast, an experienced manager/operator like Matus does not need such guidance. Matus confirmed that he discusses how many employees to hire with his assistant manager (Victor Giamanco), and only “sometimes” with Sands.

The Employer contends that manager/operators have authority to hire specific employees, or effectively to recommend hiring them. There appears to be no dispute that local theater managers solicit and receive applications from applicants, conduct whatever informal “interview” is needed, and forward the paperwork to the corporate office in New Jersey. Likewise, it is undisputed that neither Sands nor anyone else from upper management “interviews” the candidates. However, the witnesses disputed who actually “approves” and “hires” the candidates. Specifically, Oines testified that theater managers alone decide which person to hire, and actually make the job offer to a candidate, subject only to passing a post-offer drug test and background test. Oines’ testimony seems to correspond with the Employer’s New Hire Checklist (Er. Ex. 28(j)), which requires a written application and background-check authorization form at “Step 1” (interview), and then requires the drug-test form and other forms at “Step 2” (offer). The candidate must then go within 24 hours to a private drug-testing subcontractor, and the results are sent to Cablevision. In the meantime, the background check authorization is faxed to Cablevision. The Employer later notifies the theater manager via e-mail whether the applicant has passed the drug and background check. According to Matus,

he cannot offer a job until the Employer tells him to at that point. At some point by the person's first day of actual work, a whole packet of new-hire forms must also be signed, including a W-4 tax form, I-9 immigration form and acknowledgements of various company policies. This entire packet of paperwork is eventually sent to Sands and to the Employer's employee relations department for approval, but it appears that those signatures are not required before the person actually starts working. Thus, while Oines' testimony characterized Step 2 of the process as the theater manager's "offer" of employment (albeit conditional on the drug/background checks), Matus' testimony characterized the job as not really being "offered" until after the company approves the results of the drug and background check. Sands' testimony emphasized that he does not sign the paperwork until after the person has already started working.

On cross-examination, Oines admitted that he knew of no specific examples of manager/operators hiring in the relevant five theaters. However, Sands gave some examples. He testified that manager/operator Lindley recently hired some floor employees at the Herricks theater, in line with their discussion (mentioned above) regarding how many employees to hire for the summer. Sands also knew that assistant manager/operator Steven Diaz hired a female employee (whose name Sands could not remember) at the Manhasset theater, because he recalled discussing with Diaz how to get the new employee "acclimated" to her new job. Sands also recalled that manager operators Joseph Matus, Jack Dumas and Michael LoPiccolo made some hires, because he saw the relevant paperwork. During the hearing, the Employer also submitted new hire forms indicating that the manager/operators interviewed candidates, and that they signed the forms on the "hire date," even though upper management's signatures did not

appear until later dates.³ Sands testified that he did not interview or select any of these candidates.

Matus generally downplayed his role in the hiring process, for example, by stating that there are so few applicants for the low-paying floor staff positions, he has to “take whatever he can get.” (Sands likewise stated that there are too few applicants, and that managers in some towns have to make special efforts to post job openings at schools and other nearby towns.) Matus claimed never to have had more than one applicant for any vacancy, and therefore that he never had to choose from among candidates. Furthermore, Matus stated that his assistant manager, Victor Giamanco, often interviews candidates because Giamanco is more available, whereas Matus is busy with projection duties and other duties. Finally, Matus said that his “interview” consists only of accepting the application form, asking about the applicants’ availability, and telling them that the job requires customer service skills. Nevertheless, Matus admitted that, to the extent that any selection takes place based on “other qualities” (i.e., other than passing the drug test and background check), he is the person who makes the selection.

As for whether the manager/operators’ “recommendations” for hiring are effective, Sands initially testified on direct examination that he did not recall ever rejecting any new hires who were recommended by the theater manager/operators, in his

³ Specifically, Er. Ex. 24(a) shows that Lauren D’Ambrosio was interviewed by Matus, and that Matus signed the form on the “hire date” of 3/28/03, even though Sands and Employee Relations did not sign the form until 4/7/03 and 4/8/03.

Er. Ex. 24(b) shows that Robert Nielson was interviewed by Matus, who signed the form on the hire date of 2/20/04, even though other signatures did not appear until 2/24/04 and 2/25/04.

Er. Ex. 24(b) shows that Lauren Kahaner was interviewed by Diaz, who signed the form on the hire date of 11/14/03, even though the other signatures did not appear until 12/23/03 and 12/24/03.

Er. Ex. 28(j) shows that Mike Dellasperanzo was offered a job by Matus, who signed the new hire checklist on the 2/14/03, although Sands and Employee Relations did not sign it until 2/24/03 and 2/26/03.

five years as division manager. (On cross-examination, Sands admitted the possibility that he had rejected candidates, but he did not recall actually having done so.) By contrast, Matus gave two examples. One time, he tried to re-hire a college student who had previously worked at the Babylon theater when she was in high school. However, Sands told Matus not to hire her because she had a bad credit report. On another occasion, Matus wanted to hire a stepson of one of his relatives, but Sands told him it would be against company policy. Matus did not recall how many candidates total he had hired or recommended in his five years as manager/operator. Thus, it is not clear from the record what proportion of his recommendations was rejected. It should be noted, however, that those two examples do not represent upper management's disagreement with Matus' exercise of his discretion in that area. Rather, it appears that Matus' exercise of his hiring authority simply conflicted with management's specific personnel policies.

Assigning and directing employees' work

As stated above, the floor staff's duties include selling tickets, selling popcorn and other items at the concession stand, taking the tickets when customers enter the theater and cleaning various areas of the theater. Oines testified that all floor employees are "cross-trained" to perform all of these tasks, and that the manager/operators are responsible for deciding which employees should perform which tasks on a particular shift. Both Oines and Sands testified that they have seen manager/operators tell floor employees to perform specific tasks (e.g., make popcorn, clean the popper, sweep the lobby, change a light bulb, etc.). There is no evidence that upper management has any

role in these day-to-day assignments. On the other hand, there is no evidence that these assignments require any independent, non-routine judgment.

Appraisals and wage increases

Theater managers (including manager/operators) fill out an annual appraisal form (part of Er. Ex. 11) by rating employees on a scale of 1 to 5, in various categories such as quality, productivity and attendance. The Employer has established a range of wage increases that may result from the overall rating. Specifically, the highest rating gets 5% to 6% more, the second highest level gets 4% to 5% more, the middle level gets 3% to 4% more, and the lower two levels generally do not receive an increase (Er. Ex. 12, last page).⁴ The total amount must stay within each theater's overall budget for increases.

Oines testified that the theater managers fill out and submit these appraisal forms, along with a payroll change form for suggested increases, to their division manager. Oines stated that theater managers do not have to get permission from their superiors before granting a wage increase within the ranges specified above. However, if a theater manager recommends a higher increase (i.e., outside of the pre-approved ranges), upper management must review it and decide. It is not clear from the record how often Oines approves or disapproves recommended increases outside of the

⁴ The Employer's appraisal procedures underwent some changes in 2003, such as changing the rating scale (zero to 100%, versus a scale of 1 to 5), changing the increase ranges (actual amounts in cents, versus percentages) and changing the appraisals' timing (each employee's anniversary date, versus everyone being evaluated at the same time each October). However, it appears that these changes have not significantly affected the theater managers' role appraising employees and recommending their wage increases.

specified ranges.⁵

The Employer submitted the following examples of manager/operators granting or recommending wage increases:

Er. Ex. 13 shows that operator/manager LoPiccolo (Grand Avenue theater) gave an “outstanding” rating to Stephanie Cannizzaro on 7/20/02, and submitted a payroll change form on the same day, to increase her hourly rate from \$6.25 to \$6.50. The payroll form was later approved by Sands, Oines and someone from the human resources department.

Er. Ex. 25(a) shows that operator/manager Joseph Matus (Babylon theater) gave an outstanding rating to Jon Hansen on 5/30/03, and submitted a payroll form on the same day, to increase Hansen’s rate from \$6.00 to \$6.40. The payroll change form was later approved by Sands, Oines and human resources.

Er. Ex. 25(b) shows that LoPiccolo gave Khadijah Absolom an overall rating of 3 on 9/30/03, and recommended an increase from \$6.25 to \$6.47. The increase was later approved by Sands.

Er. Ex. 25(c) shows that manager/operator Stephen Truglio (Roslyn theater) gave Mario Solis a rating of 4 on 10/11/03, and submitted a payroll form to increase Solis’ rate from \$7.00 to \$7.28. The increase was later approved by Sands.

Er. Ex. 33(a)-(b) shows that Matus gave a “very good” rating to Pamela Kloepfel on 9/28/01, and submitted a payroll form to increase her rate from \$5.50 to \$6.00 on 9/29/01. The increase was later approved by Sands and human resources.

Er. Ex. 34(a)-(d) shows Matus’ appraisals of Freddie Sanchez in two successive years. A “very good” rating in 2002 accompanied a payroll change from \$5.50 to \$6.00, which was approved by Sands and others. An “outstanding” rating in 2003 accompanied a payroll change from \$6.00 to \$6.40, which was approved by Sands and others.

Consistent with Oines’ testimony, Sands also testified that manager/operators fill out the appraisal forms and payroll change form before submitting the forms to him. He

⁵ Oines testified that, in his two years as vice president of operations, he has disapproved approximately 20 recommended wage increases that were outside the specified ranges. However, since the record does not indicate how many employees work in the 54 theaters under Oines’ purview, it is impossible to assess any percentage which the 20 would represent. Oines noted that he has never disapproved a recommended wage rate *within* the specified ranges.

claimed not to tell the manager/operators how to evaluate the employees, nor what specific rating or increase to give. Sands estimated that, in his five years as division manager, he has seen between 200 and 300 such appraisals. However, he did not indicate how many he has approved or disapproved.

The Employer instituted a new appraisal procedure in late 2003 (Er. Ex. 12), requiring theater managers to review the appraisals and proposed merit increases with the division manager before discussing it with the floor employees. Sands admitted that he reviewed some of the appraisals before they were finalized. However, he claimed that his review was limited to the appraisals' quality (e.g., their wording and their internal consistency), and that he did not evaluate the quality of the employees' work, or tell the managers what ratings to assign.

Manager/operator Matus generally agreed that he has authority to decide what increase to give employees, both within the pre-approved ranges based on their ratings, and within his theater's overall budget. He also noted that, before 2003, he was not required to review the appraisals/increases with Sands before giving them to employees, and that the late 2003 appraisals were the first time he had to meet with Sands in advance. However, contrary to Sands' testimony, Matus claimed that Sands *did* tell him to change some ratings. According to Matus, Sands generally told him to lower the ratings in 2003 because his proposed increases exceeded the 4% total allowed in the theater's budget, and specifically told him to lower the rating/increase for an employee (Jeff Ziman) who had been reprimanded twice that year. Sands did not dispute this testimony. Matus did not remember any other specific examples of Sands disapproving his recommended increases.

Promoting employees

Sands testified that theater managers, including manager/operators, have authority to recommend promoting floor employees, such as to a “lead” floor staff position, which was created in 2003.⁶ Sands said that manager/operators at all five theaters in question have promoted employees to lead positions. As an example, the Employer introduced Er. Ex. 23, a payroll change form showing that Matus recommended promoting Lauren D’Ambrosio to the lead position in the Babylon theater in January 2004, and recommended increasing her rate from \$5.64 to \$7.00 per hour. The form was later approved by Sands, Oines and human resources.

Matus attempted to downplay his role in promoting employees, for example, by pointing out that Lauren D’Ambrosio was the only person who applied for the lead position at that time. When confronted on cross-examination with Er. Ex. 31(a), which appears to show his promotion of Victor Giamanco to assistant manager in 2001, he testified that Sands recommended the promotion, and that he (Matus) simply agreed. When confronted with Er. Exs. 29(c) and 30(a), which purport to show Matus’ recommending Jeffrey Ziman for promotion to corporate trainer and a 75¢ hourly increase in 2002, Matus testified that assistant manager Giamanco was the person who recommended the promotion, and that he (Matus) simply signed the paperwork, and that Sands made the final decision. However, when confronted with Er. Ex. 32(a)-(d), the promotion of Danielle Cardillo to staff supervisor in January 2001 and then staff

⁶ It appears that the Employer has used various titles over the years for lead floor employees, such as “staff supervisor,” “corporate trainer” and “lead.” These employees perform regular floor staff duties, but also help direct employees’ routine tasks, train new employees and coordinate break times. They receive a higher pay rate than other floor employees. However, there is no contention by any party that the lead employees are supervisors as defined in the Act.

supervisor/corporate trainer in April 2001 (with corresponding wage increases), Matus admitted unambiguously that he was the person who promoted her.

Adjusting grievances

Sands testified that manager/operators have authority to adjust employees' grievances. As a specific example, a floor employee in Manhasset with "bad ankles" complained that she could not stand for very long and therefore she could not work in the concession area. In response, assistant manager/operator Steven Diaz assigned her to work in the box office, where she could sit.

Matus testified that he does not adjust employee grievances.

Transferring employees

Sands testified that when one theater is short-staffed (e.g., when an employee calls in sick), a manager/operator at another theater may temporarily transfer an employee there to help. The manager/operators often ask Sands to help start the communication process by contacting another manager/operator for assistance, but the manager/operators may contact each other directly if they wish. Sands specifically recalled that assistant manager Steven Diaz contacted him three times when his theater was short-staffed, and asked Sands to initiate a transfer. However, Sands did not learn of a temporary transfer to the Manhasset theater until after the fact, when manager/operator Jack Dumas sent him a copy of an e-mail message thanking another theater manager for sending an employee. Sands also recalled that manager/operators Lindley, LoPiccolo and Matus were involved in temporary transfers between theaters.

Matus initially testified that he was not "involved" in the transfer of employees. When questioned by the Employer's attorney, Matus explained that his assistant

manager, Giamanco, sometimes “loans” Babylon employees to other theaters “on his own,” without Matus’ involvement. Nevertheless, upon further questioning, Matus conceded that he too has authority to transfer employees temporarily.

Discipline and discharge

Both Employer witnesses, Oines and Sands, testified generally that manager/operators have independent authority to give verbal warnings to employees, and to recommend other types of “corrective actions” (such as a performance improvement plan or “PIP”) to upper management. Likewise, the Employer’s written materials regarding the “corrective action process” (Er. Ex. 10) state that managers may “counsel” employees, but that any further corrective action must be addressed via the Employer’s employee relations department. Any serious infractions warranting suspension or termination must be investigated and decided by employee relations.⁷ Nevertheless, for an infraction requiring immediate action (such as violence), managers may suspend an employee immediately, pending a subsequent investigation by employee relations.

⁷ On September 28, 2004, the Union filed a motion to re-open the record, for the purpose of admitting into evidence an e-mail message from division manager Sands dated 9/2/2004, reminding a theater manager/operator that “Our discipline procedure ... does not allow for theatre management to suspend anyone without my approval or employee relations['] approval.” The Employer opposed the motion to re-open.

I hereby deny the Union’s motion to re-open the record. It is clear from the existing record that theater managers do not have independent authority to suspend employees without approval from upper management, except perhaps in emergency situations. Oines’ testimony, Sands’ testimony and Er. Ex. 10 all make this abundantly clear. Likewise, the manager/operators’ job description states that they “hire, train, direct and supervise all employees, **including disciplining and terminating employees as directed by HR**” (Er. Ex. 6, emphasis added). Therefore, the proffered e-mail message -- simply reminding a manager of this existing policy -- is unnecessary and redundant. Moreover, in finding the manager/operators to be statutory supervisors, I do not rely on their alleged authority to discipline employees. Rather, I rely on other indicia of supervisory authority, such as their authority effectively to recommend hiring, promoting and rewarding employees. (See Discussion section below.) Therefore, acceptance of the proffered e-mail message regarding discipline would not change the result herein. Accordingly, I deny the motion.

The only specific example of a verbal warning issued by a manager/operator involved a floor employee named Jeff Ziman. Specifically, Sands testified that manager/operator Matus reprimanded Ziman in 2003 for vandalizing some property at the Babylon theater. Other purported examples did not really show that manager/operators disciplined floor employees. For example, Sands testified vaguely that manager/operator Lindley had “conversations” regarding some employee’s poor performance at the Herricks theater, but Sands did not know whether Lindley actually imposed discipline. Oines testified somewhat vaguely that a floor employee at the Herricks theater was suspended pending an investigation in early 2003 for allegedly accepting money for customers’ admission without issuing tickets. After the investigation proved inconclusive, the employee was brought back with a simple warning. However, Oines’ testimony failed to specify what role, if any, the manager/operator (Lindley’s predecessor) played in this discipline.

Neither Oines nor Sands knew of any specific examples of PIPs, suspensions or terminations by the manager/operators in the five theaters in question herein.

Consistent with the Employer witnesses’ testimony, Matus also testified that he gives verbal warnings, such as reprimands he gave to Jeff Ziman for vandalism and for working at another theater for a different company.⁸ However, Matus said he has not been involved in any discipline beyond that. In fact, Matus complained that his recommendation to suspend and terminate a male employee two years ago for sexual harassment was ignored by upper management. Specifically, after female staff members complained to Matus about harassment, Matus sent an e-mail message to Sands and

⁸ These were the two reprimands mentioned above in the section on appraisals/wage increases. Specifically, Matus testified that Sands told him to lower Ziman’s ratings in 2003, based on the two reprimands.

human resources, recommending suspension and termination. But, according to Matus, upper management did not initiate an investigation or do anything else, and expressly told him to keep the male employee on the schedule. A few weeks later, some parents complained that this same employee made sexual advances to three girls and one other customer. The employee resigned shortly thereafter, before any action was taken by the Employer.

Secondary indicia

The manager/operators or, in their absence, the assistant manager/operators, are usually the highest-ranking person present at each theater. Division manager Sands, who manages 16 theaters, visits each theater approximately twice per month, for 20 to 60 minutes per visit. Sands does not substitute for manager/operators when they are absent. Vice president Oines, who oversees all 54 theaters in four states, visits each theater only once every few months.

Floor employees earn between \$5.66 and \$8.00 per hour, and “lead” floor employees earn up to \$8.84 per hour. Non-union assistant managers (who perform no projectionist work) earn \$9.00 to \$9.50 per hour. Assistant manager/operators earn between \$16.40 and \$17.89. Manager/operators earn at least \$19 per hour. (See Er. Ex. 17.)

Manager/operators and assistant manager/operators are eligible for bonuses and incentive programs, for which floor employees are not eligible. For example, the annual “theater management incentive program” gives managers a percentage of the “over budget” profits that their theater makes, and a monthly concession bonus program gives them a percentage of the concession sales.

All theater managers, including the manager/operators, have an office in their respective theaters. The manager/operators work in all areas of the theater, including the office, the projection booth, box office and concession stand. No other theater employees have an office.

All theater managers, including manager/operators, attend management meetings, including a monthly managers' meeting for Sands' division. Sands stated that assistant manager/operators may also attend, although they are not required to do so. Topics at these meetings have included the Employer's policies and procedures for hiring, evaluating and disciplining employees.

Floor employees must wear a company shirt, whereas the manager/operators must wear business attire.

DISCUSSION

For reasons explained in more detail below, I reject the Union's procedural contention that unit clarification is never appropriate for upsetting the parties' established practices. Furthermore, on the merits, I agree with the Employer's contention that the manager/operators are statutory supervisors.

Procedural issue: appropriateness of clarification after contract expiration

The Board does not allow parties, *in mid-term of a collective bargaining agreement*, to use the unit clarification procedure to upset their contractual agreement regarding unit placement. Wallace-Murray Corp., Schwitzer Division, 192 NLRB 1090 (1971)(when contract in effect explicitly includes guards and non-guards in the same unit, petition to exclude guards dismissed); Arthur C. Logan Memorial Hospital, 231

NLRB 778 (1977)(petition to exclude alleged supervisors, dismissed during the term of the contract). However, the Board allows such petitions at the appropriate time, such as after the contract expires, Rapid Armored Corp., 323 NLRB 709, 710 (1997); Washington Post Co., 254 NLRB 168 (1981)(wherein a UC petition that was filed during the contract term in an earlier case was dismissed, but a subsequent petition that was filed after contract expiration was processed as timely), or even shortly before the contract expires, Wallace-Murray, *supra*, 192 NLRB 1090, fn.1. *See also* Arizona Electric Power Cooperative, Inc., 250 NLRB 1132, 1134 n.10 (1980)(an unfair labor practice case noting that, although the employer is bound by voluntary agreement covering a unit which included an admitted supervisor, the employer's duty to bargain regarding that individual could be contested at the expiration of the contract). Thus, although the Employer in the instant case could not have used a unit clarification in mid-term of the parties' 1995-99 contract to exclude manager/operators, who were explicitly encompassed by that contract, the Region may appropriately process a petition at this time, after the contract's expiration.

Supervisory status of manager/operators

Section 2(11) of the Act defines a supervisor as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The statutory indicia in Section 2(11) must be read in the disjunctive. Thus, an individual who possesses only *one* of the enumerated authorities may be a supervisor, as long as the individual also meets the other statutory criteria (i.e., using independent

judgment, exercising authority in the employer's interest). Opelika Foundry, 281 NLRB 897 (1986); Arlington Masonry Supply, Inc., 339 NLRB No. 99, slip op. at p.2 (2003).

In the instant case, I conclude that the manager/operators possess at least one of the indicia enumerated in Section 2(11), and therefore the Employer has met its burden of proving their supervisory status.

The record indicates that manager/operators have authority to hire employees, or effectively to recommend hiring. They independently decide how many employees to hire, within the budgetary constraints for their theater. Although they may choose to ask division manager Sands for guidance in this regard, they do not need Sands' specific approval. Furthermore, in terms of selecting particular employees, the manager/-operators are the only people who interview applicants and make recommendations. Neither Sands nor anyone else from upper management interviews the applicants. During the hearing, Sands gave several examples of manager/operators and assistant manager/operators who had hired employees for their respective theaters (including Lindley, Diaz, Matus, Dumas and LoPiccolo) without significant input from upper management. Although the Union's witness tried to downplay his role, it is obvious from the description of the Employer's hiring process that the manager/operator alone makes the initial selection based on the applicant's availability and other qualities. The Employer's subsequent approval or disapproval is based only on a routine background check, not an independent investigation or judgment of the applicants' qualities. Furthermore, although Matus gave two examples of his recommendations being rejected, it appears that the manager/operators' recommendations are usually followed. The theater manager/operators' role in hiring is akin to the meat and seafood managers

in Fred Meyer Alaska, Inc., 334 NLRB 646 (2001), who were found to be supervisors because they had either (1) interviewed candidates on their own and made recommendations that were accepted by their superiors (food managers) without independent investigation, or (2) attended interviews with the food manager, and their resulting recommendations were “typically followed.” In short, I find that the manager/operators have authority effectively to recommend hiring floor employees.

In addition to deciding how many employees to hire overall, the manager/operators also decide on the day-to-day scheduling of employees, including how many employees to assign for each shift, how many hours of work to schedule within the theater’s budgetary constraints, and independently approving or disapproving employees’ requests for time off. For example, when Matus was directed to cut the payroll for his theater, he decided to reduce everybody’s hours across the board, rather than singling out any particular employees. Thus, although the Employer sets certain limits in terms of payroll and overtime expenses, it appears that manager/operators have significant leeway to schedule employees within those limits, which directly affects employees’ work hours and earnings.

Although the mere act of evaluating employees does not prove supervisory status, evaluations which directly effect employees’ employment status are supervisory. First Healthcare Corp., d/b/a Hillhaven Kona Healthcare Center, 323 NLRB 1171 (1997)(nurses whose evaluations directly affected CNAs’ wage increases, found supervisory). Here, the evidence demonstrates that the manager/operators’ annual appraisals directly affect the employees’ wage increases, inasmuch as the numerical rating (on a scale of 1 to 5) determines the range of increases allowed (expressed in

percentages). In fact, the appraisal procedure requires manager/operators to submit their evaluations *with a payroll change form* corresponding to their suggested increase.

During the hearing, the Employer gave several specific examples of manager/operators granting or recommending wage increases that were implemented. By contrast, the Union's witness recalled only one instance when the division manager disapproved an increase that he had recommended. I find that the manager/operators' role in evaluating employees, and specifically in recommending annual wage increases, indicates that manager/operators have authority effectively to recommend rewarding employees within the meaning of Section 2(11).

Similarly, manager/operators have authority to promote employees, or effectively to recommend promoting them. For example, the record evidence indicates that manger/operator Matus recommended promoting Danielle Cardillo to a "staff supervisor" position in 2001, and Lauren D'Ambrosio to a newly-created "lead" floor staff position in 2004. Sands testified without contradiction that the manager/operators in each of the five theaters in question have promoted a floor employee to a lead position. The evidence clearly demonstrates that manager/operators have authority to promote employees, or effectively to recommend promoting them, one of the indicia of supervisory authority enumerated in Section 2(11).

Furthermore, the evidence indicates that manager/operators have authority to transfer employees temporarily, whenever a theater is "short staffed." Finally, there is evidence that manager/operators may have authority to adjust grievances, although there was only one specific example in the record.

It should be noted that I do *not* base my finding of supervisory status on the manager/operators' role in directing or assigning floor employees' work, since there is no evidence that such assignment requires independent judgment. All floor employees have been trained to perform the various tasks (box office, concession, ticket-taking, cleaning), and the daily "divvying up" of such tasks appears to be fairly routine. Los Angeles Water and Power Employees' Association, 340 NLRB No. 146 (2003)("routine shifting" of cross-trained employees, not supervisory).

Likewise, I do not base my finding of supervisory status on the manager/operators' role in disciplining or discharging employees. Manager/operators may report misconduct to upper management, and they may issue a verbal warning or "counseling." The mere issuance of warnings, with no impact on the employee's job status or tenure, does not convey supervisory status. Williamette Industries, Inc., 336 NLRB No. 59 (2001). Manager/operators herein do not have independent authority to discipline or discharge employees. Both the testimonial evidence and documentary evidence clearly indicate that any "corrective action" beyond a warning must be decided by the Employer's upper management. In fact, when Matus recommended terminating an employee for sexual harassment, his recommendation was not effective, as demonstrated by the fact that it was not followed.

In sum, I have found that manager/operators possess several types of "primary" supervisory authority enumerated in Section 2(11), including authority to hire, promote, reward and transfer employees, and to adjust their grievances, or effectively to recommend such actions. It should be noted that manager/operators also possess some "secondary" indicia of supervisory status, including having an office, receiving bonuses

for which floor employees are not eligible, and attending management meetings regarding personnel issues. (Their contractual wages are much higher than the floor employees' wages, but that may be due to their skilled projectionist work, as much as their supervisory status.) Furthermore, since division manager Sands visits each theater for only one or two hours each month, the manager/operators are usually the only supervisors on site.

Finally, this Decision has referred to "manager/operators" or "theater managers" collectively, as including the assistant manager/operator positions. (See *supra* at fn.2.) Nevertheless, it should be noted that the record contained specific examples of supervisory authority exercised by assistant manager/operators. For example, the record indicates that assistant manager/operator Steven Diaz has hired floor employees at the Manhasset theater, and adjusted an employee's grievance there (assigning the employee with "bad ankles" to work in the box office). I therefore find that both manager/operators and assistant manager/operators are supervisors within the meaning of Section 2(11).

Accordingly, based on the foregoing, I will grant the Employer's petition for clarification and exclude manager/operators and assistant manager/operators from the bargaining unit.

CONCLUSIONS AND FINDINGS

Upon the entire record in this proceeding, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated that CCG Holdings, Inc., is a domestic corporation with its principal office and place of business located at 97 Main Street, Chatham, New Jersey. It operates movie theaters in four states, including New York. During the past year, the Employer derived gross revenues in excess of \$500,000, and purchased and received goods and supplies valued in excess of \$5,000 directly from suppliers outside the State of New York. I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. Motion Picture Projectionists, Local 640, International Alliance of Theatrical Stage Employees, is a labor organization as defined in Section 2(5) of the Act.

4. In accordance with the discussion above, I conclude that the manager/operators and assistant manager/operators are supervisors as defined in Section 2(11) of the Act, and that they must be excluded from the unit.

ORDER

Accordingly, IT IS HEREBY ORDERED that the petition to clarify the bargaining unit of projectionists employed by the Employer-Petitioner at its movie theaters in Nassau and Suffolk counties, New York, to exclude manager/operators and assistant manager/operators, is granted.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570.

This request must be received by November 8, 2004. The request may **not** be filed by facsimile.

Dated: October 25, 2004.

John J. Walsh
Acting Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201